1960

Frank Baine v. George Beckstead : Petition for Rehearing and Brief

Utah Supreme Court

D. H. Oliver; Attorney for Appellant;

In the
Supreme Court of the State of Utah

FRANK BAINE,
Plaintiff and Appellant,

vs.

GEORGE BECKSTEAD, Sheriff of Salt Lake County,
Defendant and Respondent.

Case No. 9049

PETITION FOR REHEARING AND BRIEF

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TABLE OF CONTENTS

BRIEF

STATUTES CITED

CASES CITED

AUTHORITIES CITED

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PETITION FOR REHEARING AND BRIEF

The appellant hereby petitions the court for a rehearing in the above entitled cause, and assigns therefor, the following points:

1. Error of the court in holding that appellant pleaded guilty to the crime of issuing a check against insufficient funds.

2. Error of the court in holding that on March 27, 1959, appellant had a hearing at which he was sworn and testified against himself.

Respectfully submitted,

D. H. OLIVER,

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Salt Lake City, Utah.

BRIEF

To sustain this petition appellant relies on the following:

STATEMENT OF POINT

POINT I.

NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

U. S. Constitution, Amendment 14 Sec. 1,
Secs. 77-51-3 and 77-51-4, Utah Code 1953,
Barnes vs. *District Court,* 104 P. 282, 16 C. J. 449,
State vs. *Bonza,* 150 P. 2nd 970,
Christiansen vs. *Harris,* 163 P. 2nd 314,
Darnell vs. *Haines,* 203 P. 712.

STATEMENT

Pursuant to Rule 75 (h) it is stipulated that the Supplemental record, consisting of Pages 1 to 7, may be, and is, filed as part of the record on this appeal.

In paragraphs 1 and 2 of appellant's petition (R. 1), it is alleged that appellant is unlawfully restrained of his liberty, in that on or about March 14, 1958, he was convicted and sentenced to prison and then placed on probation. The respondent admitted these allegations (R. 4). In its opinion, this court said that appellant pleaded guilty to the offense charged, and for this reason the verdict of the jury, (S. R. 1), is submitted to correct that error.

This court also states that appellant testified that on March 27, he was sworn and testified. This statement is erroneous and for this reason the record of what transpired on that date is submitted to the court for clarification (S. R. 6-7).

ARGUMENT

POINT I.

NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

Whether or not the appellant pleaded guilty or was convicted of the offense of issuing a check against insufficient funds, we think, is immaterial to the issue involved on this appeal, but since the court seems to have placed some credence on that fact, we have submitted the verdict of the jury, for the scrutiny of the court, (S. R. 1).

The principle herein contended for is set forth in appellant's original brief on file herein, and which is made a part hereof by reference thereto.

In addition to violating the due process clauses therein set forth the appellant contends that under the majority opinion written in this cause he is denied the equal protection of the law as guaranteed by the Federal Constitution.

This court seems to adhere to the principle laid down in the *Zolantakis* case, decided several years ago, and wherein the rule was spelled out in the *Bonza* case by the unanimous opinion of this court, as follows:

> "Where the commission of a subsequent offense is made the basis of an application for termination of probation, and a complaint or information has been lodged charging probationer with its commission, action by the probation court may well abide the determination of his guilt or innocence in the court before which the prosecution is conducted."

In approving this rule this court narrowed the application thereof as follows:

> "However, if there is dispute about the accusation upon which the revocation is based, and concerning which reasonable minds might differ, a hearing and inquiry into the matter should be held."

This court refers to *Christiansen* vs. *Harris,* as illustrative of the application of this rule wherein, it was held that under the circumstances in that case a hearing was not required. In the *Christiansen* case the probationer appeared in court on his regular reporting day and made confessions as follows: (1) That he had pleaded guilty to intoxication, (2) That he had knowingly issued several checks without funds, (3) That he had never lived up to the expectations of the court, himself, and everyone else, and (4) I have not lived up to my promise.

In the instant case appellant's conduct had been exemplary, except on one instant when he was accused of assaulting one Earlene Kennon with a deadly weapon, a charge about which reasonable minds may differ. At the present time there is not one scintilla of evidence in the entire record which even indicates what the facts were in regard to the alleged assault and in this respect, if the facts were known, it may be debatable as to whether or not an assault of any kind was made.

The order to show cause was returnable March 16, 1959, (Ex. 2), at which time appellant appeared in person and by counsel and, upon motion of appellant, the matter was continued to March 25 (S. R. 2). On March 25, the order to show cause was dismissed, (see stipulation R. 14 and S. R. 3).

The appellant appeared in court on March 27, and upon being asked by the court if he had had some difficulty with his probation and the law, the appellant answered, (not under oath), "yes" (S. R. 6). The word *difficulty*, in and of itself, does not imply crime and where one's liberty is at stake it certainly should not be construed to mean crime. During the inquiry the appellant told the court he had had a *misunderstanding* with Miss Kennon (S. R. 6). By no stretch of the imagination can the word *misunderstanding* imply crime. And under our American system of jurisprudence the filing of a complaint charging a person with crime is no evidence that the person accused is guilty. No one appeared at this purported hearing to testify as to what the appellant actually did on the occasion in question, and for this reason there was no evidence whatsoever that appellant had violated his probation.

This brings us to the fundamental problem presented by the facts of record, namely, First, what effect did the dismissal of the order to show cause have on the status of the proceedings on March 25? Second, what effect did that dismissal have on the appellant? and Third, may the state lull a probationer into a feeling of security and then, without notice and an opportunity to defend, take advantage of him?

In answer to the first inquiry, Sec. 77-51-4 of the Utah Code, provides:

> "The court may, either on its own motion or upon the application of the District Attorney, in furtherance of justice, order an action, information or indictment to be dismissed. The reason for the dismissal must be set forth in an order entered upon the minutes."

And Sec. 77-51-3 provides:

> "If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail shall be exonerated, or money deposited instead of bail must be refunded to him."

In *Barnes* vs. *District Court*, this court construed the effects of these statutes with the following language:

> "True, such a dismissal and discharge might not be a bar to another prosecution for the same offense. But that is another thing. When the action was dismissed, and the defendant discharged and sent out of court, that put an end to that controversy."

In construing the effect of a dismissal of a complaint in a civil action the Supreme Court of Kansas in *Darnell* vs. *Haines*, said,

> "In our opinion the appeal from the Probate Court, gave the District Court jurisdiction of the entire proceedings, and the dismissal there left nothing pending in the Probate Court."

Thus it is clear that in both, criminal and civil actions, a dismissal of any proceeding leaves nothing pending before the court for consideration on the matter dismissed.

As to the second inquiry, the record shows that on March 25, *for good cause shown,* (S. R. 3), the Order to show Cause was dismissed and appellant left court feeling that the matter had been disposed of; and it is the position of appellant that he was justified in so thinking. This brings us to inquiry (3), May the State, by positive and affirmative action, mislead a defendant and his counsel by inducing them to believe that the particular matter will not be pursued any further, and then proceed, without notice, to have the same matter disposed of on the merits?

In the footnote to 16 C. J. at page 449, we find this language:

> "A trial is a farce—indeed, and no trial at all, if the defendant be not given an opportunity to prepare for trial—which is another way of saying an opportunity to be heard. It is a mockery, solemnly, to assure him that he has a right to defend by himself and by his witnesses; and then say to him, when, in pursuance of the assurance, he demands his trial, you shall not have an opportunity to prepare for trial or to produce your witnesses. It goes without

saying that the right to a trial without an opportunity to prepare for it is an idle a fatuous thing."

The record of March 27, (S. R. 7), indicates the predicament in which appellant found himself. The record also indicates that the whole procedure was master-minded by the State for the sole purpose of taking undue advantage of appellant. And if this type of procedure is to be tolerated by this Court, then the door is open to greater mischief than that discussed in its opinion in this case. Any disgruntled person may file a complaint against any probationer; have the complaint dismissed, then have probation revoked without probationer having a chance.

In this case the Respondent has stipulated that a rehearing may be had (see stipulation filed Dec. 21).

CONCLUSION

We respectfully submit that the law as enunciated by the Court in this case is sounder, more just and equitable than that recommended by the minority opinion and, should be sustained as the law of this state; and that the procedure revealed by the record in this case shows a denial of the protection that law offers to every individual, and therefore, should be reversed, as a complete nullity.

Respectfully submitted,

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